

Your Ref:

Our Ref: Property & Development Law Section

20 January 2011

The Honourable Cameron Dick MP
Attorney-General and Minister for Industrial Relations
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

Dear Attorney

PROPOSED TIME OF THE ESSENCE SETTLEMENT MORATORIUM FOR FLOOD AFFECTED RESIDENTIAL PROPERTY CONTRACTS

Thank you for your telephone call today in response to our communications from 13 January 2011 with your office on this issue.

The recent flooding experienced throughout most parts of Queensland has significantly and unexpectedly disrupted the legal practices of our members, the operation of financial institutions and Government agencies. A direct result of these disruptions is that many parties involved in property conveyances are finding themselves unable to attend settlement on the stipulated date through no fault of their own.

As you would be aware in Queensland the standard conveyancing contract makes time of the essence and a failure to attend settlement, for any reason, is a breach of contract. Such a breach can give rise to the imposition of penalty interest until settlement is effected, or alternatively, it can provide the other party an opportunity to terminate the agreement altogether and re-sell.

I have received reports from members that some vendors are enforcing their rights very strictly at this time with respect to requests for extensions of settlement due to flood related disruptions. I have been informed of cases of punitive interest being applied in excess of the QLS set standard contract default rate and also occurrences of the practice known as 'gazumping'.

It is not contrary to the law or the express terms of contractual arrangements for a party to refuse a request for an extension but it appears to be unfair and unreasonable for a vendor to refuse a request for a settlement extension at this time when it is occasioned directly by factors outside of the control of one of the contract parties due to the floods.

Legislative action with respect to displacing the strict compliance with time periods during unforeseen events in contracts for sale is not unprecedented. Section 70A of the *Property Law Act 1974* suspends time of the essence for a contract of sale when:

- a contract for the sale of land does not provide otherwise; and
- time is of the essence of the contract; and
- the purchaser under the contract, without default on the purchaser's part, can not, on the date for completion of the contract, verify the vendor's title because computers in the relevant office of the land registry under the *Land Title Act 1994* are inoperative for any reason.

This provision suspends when time of the essence applies to a contract for sale until after the disruption of the computer equipment has been rectified.

In the present circumstances this provision does not apply as the Titles Office computers have not been interrupted.

We note that under section 64 of the *Property Law Act 1974* a purchaser has until settlement, or prior possession, the right to rescind a contract for sale of a dwelling house where it is so destroyed or damaged as to be unfit for occupation. This section does not provide the buyer with an ability to obtain an extension of time for settlement.

With respect to the current situation I propose that it may be possible to:

- advise parties of the effect of proposed legislation the Government will pass through a media release or other communication that will have retrospective effect from the day after the media release;
- pass legislation which:
 - commences retrospectively from the day after the media release;
 - is in effect for a defined period or up to a defined reasonable date (possibly a period of 2-3 weeks);
 - permits a party to give notice to the other party varying the date for settlement if:
 - the party is able to demonstrate they have been adversely affected by circumstances directly arising out of a natural disaster;
 - the non-compliance arises as a result of the natural disaster; and
 - it is just and equitable for them to have relief.
 - The notice given by the party must specify a new date for settlement within set time constraints (for example a maximum time of 2 weeks may be specified) and time should remain of the essence of the new date. This is similar to the position in non-time of the essence jurisdictions where a notice must be given following a failure by one party to complete.

This approach both targets those who need relief from strict compliance and also dissuade parties from taking advantage of a more general provision for collateral purposes. Such legislative instrument would provide affected parties the assistance they require and does not leave them solely at the will of the stronger disaffected party.

I would be pleased to further discuss aspects of this proposal with you as a matter of some urgency, or alternatively please speak with QLS CEO, Ms Noela L'Estrange.

Yours faithfully

Bruce Doyle
President